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No. 80-1496

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY

*Petitioner,*

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION; JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS**

## RESPONDENTS' BRIEF IN OPPOSITION

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## COUNTER-QUESTION PRESENTED

Whether North Carolina courts must give full faith and credit to an Indiana judicial assertion of jurisdiction that would abrogate statutory rights of North Carolina policyholders in a deposit placed in trust in North Carolina by an insolvent insurer domiciled in Indiana, where:

(a) The deposit was made with the North Carolina Treasurer "for the sole benefit of North Carolina policyholders," and North Carolina law prescribes the rights of those policyholders in the deposit, and

(b) The Indiana court, seeking to rehabilitate the insurer, lacked any *in rem* jurisdiction over the North Carolina trust and lacked any *in personam* jurisdiction over the North Carolina policyholders or the North Carolina officials holding the deposit.

## PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the state courts below.

The Respondent, North Carolina Life and Accident and Health Insurance Guaranty Association, is a statutorily created association and is not a corporation having parent companies, subsidiaries or affiliates. All of the 604 life and accident and health insurance companies doing business in North Carolina are required by statute to be members of the Guaranty Association. N.C.Gen.Stat. §§ 58-155.65 *et seq.*

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*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents, North Carolina Life and Accident and Health Insurance Guaranty Association ("Guaranty Association"); John Randolph Ingram, Commissioner of Insurance of the State of North Carolina ("Commissioner of Insurance"); and Harlan E. Boyles, Treasurer of the State of North Carolina ("North Carolina Treasurer"), respectfully request that this Court deny the Petition for Writ of Certiorari filed by Underwriters National Assurance Company ("UNAC").

## JURISDICTION

The Guaranty Association commenced a declaratory judgment action in the Superior Court of Wake County, North Carolina, on January 12, 1978, seeking a declaration with regard to rights in a deposit made by UNAC in North Carolina for the protection of North Carolina policyholders. The Superior Court entered a summary judgment in favor of the Guaranty Association on April 11, 1979. (Pet. App. pp. 19A-28A.) UNAC appealed the Superior Court judgment. On September 2, 1980, the North Carolina Court of Appeals unanimously upheld the Wake County Superior Court. (Pet. App. p. 5A-16A.) UNAC then filed a Notice of Appeal and Alternative Petition for Discretionary Review with the North Carolina Supreme Court. On December 4, 1980, the North Carolina Supreme Court entered a judgment dismissing UNAC's appeal and denying UNAC's petition for discretionary review. (Pet. App. p. 1A-2A.)

Since the North Carolina Supreme Court declined to exercise its authority to review, the Petition filed by UNAC errs in requesting that the petition for certiorari be directed to the Supreme Court of North Carolina. *Sullivan v. Texas,* 207 U.S. 416 (1907). The opinion of the North Carolina Court of Appeals is reported at 48 N.C. App. 508, 269 S.E.2d 688 (1980). It is the judgment encompassed in that opinion that is the proper subject of the review requested by UNAC.

UNAC filed its petition for certiorari in this Court on March 3, 1981, less than 90 days after entry of the December 4, 1980 judgment of the Supreme Court of North Carolina.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petition omits portions of the North Carolina Life and Accident and Health Insurance Guaranty Association Act ("Guaranty Act"), N.C. Gen. Stat. §§ 58-155.65 *et seq.*, that pertain to the duties, obligations and rights of the Guaranty Association. N.C. Gen. Stat. § 58-155.66, 58-155.72(4) and (9), and 58-155.73(a). The Petition also omits portions of the North Carolina enactment of the Uniform Insurers Liquidation Act, N.C.Gen.Stat. §§ 58-155.10 *et seq.*, which pertain to statutory rights of North Carolina policyholders in deposits made by insolvent insurers for the protection of North Carolina policyholders. N.C.Gen.Stat. §§ 58-155.10(2), (8) and (10), 58-155.15(d). These statutes, which are expressly applicable to both liquidation and rehabilitation proceedings, together with the North Carolina deposit statute, N.C.Gen.Stat. § 58-185, are set forth in Appendix A.

## STATEMENT OF THE CASE

The statement of the case in the Petition omitted several important facts essential to a complete understanding of this case. This portion of the brief in opposition is supplemental to the statement of the case contained in the Petition and is not intended to be a complete restatement of the case.

As a result of the questionable financial condition of UNAC, the North Carolina Department of Insurance required that UNAC make a $100,000.00 deposit in North Carolina for the protection of North Carolina policyholders. By letter dated June 18, 1973, UNAC stated that it was taking the necessary steps to have $100,000.00 in securities transferred to the North Carolina Department of Insurance to be held in trust for *"the sole benefit of*

*North Carolina policyholders.*" (Emphasis added) (Pet. p. 20A.) UNAC's deposit was registered as follows:

> "Treasurer of the State of North Carolina *in trust* for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina Statutes." (Emphasis added.) (Pet. pp. 6A, 21A.)

UNAC was subsequently determined to be insolvent and, on August 5, 1974, became the subject of an Indiana State Court rehabilitation proceeding. The final Order and Plan of Rehabilitation ("Plan") was issued by the Indiana court on November 22, 1976. Pursuant to the Plan, the Indiana court allowed UNAC to alter substantially contractual obligations in its policies. Many of UNAC's insurance policies involved guaranteed premium amounts with a return of premium rider ("RPR"). The RPR, for which there was an additional premium charge, typically provided that, if disability claims during any period of ten consecutive years equaled less than 20 percent of the premiums paid during that same period, 80 percent of the premiums paid, less the amount of any disability claims paid, would be returned to the policyholder. The Plan allowed UNAC to increase substantially the previously guaranteed premiums. The Plan also cancelled all obligations owed by UNAC pursuant to the RPR after payment by UNAC to policyholders of an amount equal to only 15.68 percent of the additional premium paid for the RPR. (Pet. p. 22A.)

The Guaranty Association is liable under the Guaranty Act to pay the premium increases allowed by the Plan and to pay all RPR benefits that were cancelled by the Plan. N.C.Gen.Stat. § 58-155.72(4). The Guaranty Association is statutorily subrogated under the Guaranty Act to the

rights of North Carolina policyholders of UNAC. N.C.Gen.Stat. § 58-155.72(9). The UNAC policyholders residing in North Carolina have specific rights in the deposit made by UNAC under the North Carolina enactment of the Uniform Insurers Liquidation Act and the North Carolina deposit statute. N.C.Gen.Stat. §§58-155.15(d) and 58-185. The Guaranty Association is seeking through its subrogation rights to obtain the deposit made by UNAC for use in paying the defaults (premium increases and RPR liability) allowed by the Plan. (Pet. pp. 14A-15A.) Absent the existence of the deposit made by UNAC in North Carolina for the protection of North Carolina policyholders, the Guaranty Association would be forced to pay these defaults by assessing its member insurers.

The deposit made by UNAC in North Carolina, and the rights under North Carolina Statutes therein, were not mentioned by the Indiana court in the Plan. Similarly, none of the documents filed with the Indiana court by the rehabilitator and none of the orders issued by the court dealt with, or even mentioned, the North Carolina deposit. The Indiana proceeding did not notify the North Carolina policyholders of the existence of the deposit or of their statutory rights in that deposit. UNAC implies that the Guaranty Association was put on notice that the rehabilitation court purported to adjudicate rights in the deposit because the deposit was included in the general assets of UNAC under part V of the Plan. (Pet. p. 9, n. 8.) Part V of the Plan pertains to the method used in determining liquidated cash values that were received by policyholders electing not to participate in the rehabilitation and has nothing to do with jurisdiction. The $100,000.00 deposit in North Carolina is not specifically mentioned in part V of the Plan. Apparently, UNAC is contending that the $100,000.00 deposit was included in

the $31,171,988.00 entry in part V listed as "Assets at Book Value per UNAC's September 30, 1975 Financial Statement."

Approximately one year after the final Order of rehabilitation was issued by the Indiana court, UNAC informed the Guaranty Association that it was taking the position that the rehabilitation proceeding in Indiana cut off any rights of North Carolina policyholders in the deposit made for their protection. The Guaranty Association then initiated a declaratory judgment proceeding in the Wake County, North Carolina, Superior Court on January 12, 1978, seeking a determination of the rights of North Carolina policyholders and the Guaranty Association in the deposit made by UNAC.

UNAC responded to the North Carolina declaratory judgment proceeding by filing a "Petition for Instructions" with the Indiana rehabilitation court on July 13, 1978. In response to UNAC's Petition for Instructions, the Indiana court issued an order on November 22, 1978. That order held that, despite the fact that North Carolina policyholders were not notified of the existence of the deposit and the fact that the deposit was not mentioned or dealt with by the court at any point in the rehabilitation proceeding, the 1976 final Order and the Plan "comprised, settled and dismissed, any rights of North Carolina policyholders in the deposit." (Pet. App. p. 38A.) The November 22, 1978 order of the Indiana Superior Court was appealed to the Indiana Court of Appeals. The appellate proceeding in Indiana has been fully briefed and oral argument has been heard. On March 11, 1981, the Indiana Court of Appeals granted the Guaranty Association's motion to stay consideration of the appeal pending this Court's decision with regard to the Petition for Certiorari filed by UNAC.

On April 11, 1979, the Superior Court of Wake County, North Carolina, determined that the Indiana rehabilitation court lacked the necessary jurisdiction to adjudicate rights in the deposit made in North Carolina for the protection of North Carolina policyholders and, thus, that the November 22, 1976 and November 22, 1978 orders of the Indiana rehabilitation court were not entitled to full faith and credit. The North Carolina Superior Court then determined that the deposit made by UNAC in North Carolina should be applied for the benefit of North Carolina policyholders. The North Carolina Court of Appeals unanimously affirmed the Wake County Superior Court in an opinion dated September 2, 1980 (Pet. App. pp. 5A-16A). By judgment dated December 4, 1980, (Pet. App. p. 1A) the North Carolina Supreme Court dismissed the notice of appeal and denied the alternative petition for discretionary review filed by UNAC.

UNAC conceded in arguments below, and the North Carolina courts found, that neither the Commissioner of Insurance nor the Trustee of the deposit, the North Carolina Treasurer, was before the Indiana rehabilitation court. (Pet. pp. 15A, 21A.)

Since the North Carolina policyholders have statutory rights in the deposit made by UNAC for their protection, their interests are in conflict with the other policyholders of UNAC who look to the company's general assets. Despite the substantial conflict of interest in the single policyholder class, the North Carolina policyholders were neither apprised of their conflicting rights nor represented before the Indiana court with regard to those rights.

The North Carolina Guaranty Association appeared before the Indiana rehabilitation court both for the purpose of negotiating a service contract under which UNAC would continue to service North Carolina policyholders

and for the purpose of having its rights under the Guaranty Act acknowledged. The Guaranty Association's liability and subrogation rights did not arise under the Guaranty Act until after the final Order and Plan was issued. N.C.Gen.Stat. §§ 58-155.72(4) and (9). The Guaranty Association, like the North Carolina policyholders, received absolutely no notification that the rehabilitation court purported to be dealing with the deposit made in North Carolina until well after the Indiana court's final Order approving the Plan.

## REASONS FOR NOT GRANTING THE WRIT

UNAC asserts that the North Carolina courts are bound to give full faith and credit to the 1976 and 1978 orders of the Indiana rehabilitation court. As reasons why certiorari should issue to enforce that constitutional obligation, UNAC advances two contentions: (1) an asserted conflict between the result below and prior decisions of this Court, and (2) the alleged national importance of the purported issue "whether the decisions of the domiciliary state of an impaired insurer are to be given nationwide effect." (Pet. p. 12.) Neither contention is justified.

The decision of the North Carolina Court of Appeals is entirely consistent with prior cases of this Court involving the full faith and credit clause and does not present any novel interpretations or questions in connection with the application of that clause. This case does not present issues of national importance, since the decision of the Court of Appeals does not pose any threat to the proper nationwide effect to be given insurance company rehabilitations. The decision by the North Carolina Court of Appeals turns solely on a unique jurisdictional determination and specific North Carolina statutes pertaining

to deposits made by foreign insurance companies for the protection of North Carolina policyholders.

*The Indiana Court's Lack of Jurisdiction.* The decision by the North Carolina Court of Appeals follows prior cases of this Court holding that full faith and credit need not be given to an opinion rendered by a court not having jurisdiction. *Thompson v. Whitman,* 85 U.S. (18 Wall.) 457 (1873). *Accord, May v. Anderson,* 345 U.S. 528, 533 (1953); *Williams v. North Carolina,* 325 U.S. 226, 229 (1945); *Riley v. New York Trust Co.,* 315 U.S. 343, 353, *reh. den.,* 315 U.S. 829 (1942); *Roche v. McDonald,* 275 U.S. 449, 454 (1928); *Baker v. Baker, Eccles & Co.,* 242 U.S. 394, 401-02 (1917). The full faith and credit clause does not require one state to accept the judicial determination of a sister state as to which possesses jurisdiction in a given case. *Thompson v. Whitman, supra.*

There are several glaring jurisdictional defects in the Indiana court's attempt to abrogate rights under the North Carolina statutes in the deposit located in North Carolina. UNAC has previously conceded that the North Carolina Treasurer, who was the trustee of the deposit, was not a party in the Indiana insolvency proceeding, and that the deposit is physically located in North Carolina. It is inconceivable that the North Carolina Treasurer could be compelled by the Indiana court to deal with the deposit in North Carolina as trustee in a way that is inconsistent with North Carolina statutes to which he is subject without even being a party before the Indiana court. Additionally, the North Carolina policyholders of UNAC could not have been properly included in the one policyholder class before the court in Indiana since they were the only policyholders protected by a special deposit. To the extent the deposit was used for the benefit of North Carolina policyholders, it would not be a general asset that could

benefit the other policyholders. Such a basic conflict of interest cannot exist within a jurisdictional class. Indiana Trial Rule 23(A); *Kimes v. Gary*, 224 Ind. 294, 66 N.E.2d 888 (1946); *McKenna v. Standard Oil Co.*, 236 Ind. 370, 140 N.E.2d 512 (1957); *Smith v. Sparks Milling Co.*, 219 Ind. 576, 39 N.E.2d 125 (1942); *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E.2d 223, *cert. den.*, 297 N.C. 609, 257 S.E.2d 217 (1979).

Further, and perhaps most importantly, the Indiana proceeding failed even to notify the North Carolina policyholders of the existence of the deposit or their statutory rights in that deposit. If the Indiana proceeding could abrogate such rights without the slightest semblance of notice of those rights, substantial due process, as well as full faith and credit, questions would arise.

In addition to not having the requisite personal jurisdiction to adjudicate rights in the North Carolina deposit, the Indiana Court also lacked *in rem* jurisdiction over the *res, i.e.*, the trust held by the officials of North Carolina. *Continental Bank and Trust Co. v. Gold*, 140 F.Supp. 252 (E.D.N.C. 1956). In *Continental Bank and Trust Co. v. Gold, supra*, the Federal District Court for the Eastern District of North Carolina considered whether a receiver appointed by the Federal District Court in Utah could require the Commissioner of Insurance and the North Carolina Treasurer to turn over a deposit made by an insurance company for the protection of North Carolina policyholders of that company. Despite the fact that, unlike in the instant case, the priority of North Carolina policyholders would have apparently been honored by the Utah federal receiver, the North Carolina Federal District Court refused to order the North Carolina Treasurer to surrender the deposit. The District Court held that the title and right to securities deposited in North Carolina were vested in the Commissioner of Insurance and the North

Carolina Treasurer as trustees, and, thus, were not property of the insurance company subject to the jurisdiction of the Utah federal receivership. The North Carolina Court of Appeals acknowledged in the decision below that *Continental Bank and Trust Co. v. Gold, supra,* correctly stated the North Carolina law. (Pet. App. p. 15A.)

UNAC argues that the North Carolina courts could not determine that the Indiana rehabilitation court lacked jurisdiction to abrogate rights under North Carolina statutes because the issue of jurisdiction was "fully and fairly litigated in the Indiana rehabilitation court," citing *Durfee v. Duke,* 375 U.S. 106 (1963). (Pet. pp. 17-18.) At no point in the rehabilitation proceeding was the existence of the deposit in North Carolina or the rights in that deposit under North Carolina statutes addressed by the Indiana court. (Pet. p. 23A.) The deposit made in North Carolina was not individually listed as an asset of UNAC, and the North Carolina policyholders were not told of its existence. Not only did the Indiana court fail to fully and fairly adjudicate the question of jurisdiction over the deposit it apparently completely overlooked the rights under North Carolina statutes in that deposit. The Indiana court's retrospective holding two years after the final Order and Plan that it had jurisdiction over the deposit and that its order did, in fact, abrogate the statutory rights of North Carolina policyholders in that deposit falls far short of "fully and fairly" litigating the issue of jurisdiction.

*The Decision by the Court Below.* The decision of the North Carolina Court of Appeals is also consistent with prior decisions of this Court, as well as the courts of many of the states, concerning the validity of deposits. This Court in *Blake v. McClung,* 172 U.S. 239, 257 (1898), spoke approvingly of such special deposits:

> "Insurance funds set apart in advance for the benefit of home policyholders of a foreign insurance company doing business in the State are a trust fund of a specific kind to be administered for the exclusive benefit of certain persons. Policy holders in other States know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited."

The Court in *Blake v. McClung* then addressed the constitutional validity of such deposits in stating that "[l]egislation of that character does not present any question of discrimination against citizens forbidden by the Constitution." *Id.*

The decision of the North Carolina Court of Appeals tracks the overwhelming weight of authority holding that deposits made by an insolvent insurer for the protection of a specified group of policyholders must be used for the purpose for which the deposit was made.[1] For instance, in *Preferred Insurance Co. v. Bentley, supra,* a Michigan insurance company had made deposits with Georgia State officials for the benefit of local policyholders. Georgia, like North Carolina, had enacted the Uniform Insurers Liquidation Act. Michigan, like Indiana, had not enacted the Uniform Insurers Liquidation Act. The Georgia

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[1] *E.g., State v. American Bonding and Casualty Co.*, 206 Io. 988, 221 N.W. 585, 586 (1928); *Boston-Alb. Railroad v. Mercantile Trust and Deposit Co. of Baltimore*, 82 Md. 535, 34 A. 778, 780 (1896); *Maurer v. International Re-Insurance Corp.*, 20 Del. Ch. 173, 174 A. 360 (1934); *Preferred Insurance Co. v. Bentley*, 223 Ga. 735, 157 S.E.2d 737 (1967); *State* v. *Bowen*, 131 O.St. 310, 2 N.E.2d 824 (1936); 2 *Couch on Insurance* §§ 22:94, 22:96, 22:111 (2d ed. 1959); 19 Appleman, *Insurance Law and Practice* § 11094 (1946); 43 Am.Jr.2d, *Insurance* §§ 139, 140 (1969); 44 C.J.S., *Insurance* § 134 (1945); 5 Joyce, *Law of Insurance* § 3595 (2d ed. 1918).

Supreme Court held that the deposits were to be used first to the benefit of local claimants, with the balance, if any, to be paid to the domiciliary receiver. "[T]here is hardly a break in the line of decisions to the effect that receivers and assignees are not entitled to demand or obtain the possession of such securities . . . ." *Vandiver v. Poe,* 119 Md. 348, 87 A. 410, 413 (1913).[2]

*State Grounds.* This is not an appropriate case for this Court to act as "umpire" of the federal system. The decision of the North Carolina Court of Appeals in this case is based on adequate state grounds. The North Carolina Court of Appeals held, as a matter of state law, that the deposit was held in trust exclusively for the benefit of North Carolina policyholders, and, therefore, "was not an asset of the company subject to the Indiana rehabilitation proceeding." (Pet. p. 15A.) That holding was based upon specific facts pertaining to jurisdiction and upon the Court of Appeals' interpretation of the North Carolina statutes and case law pertaining to insurance company deposits. This Court has held that it is inappropriate to review such a judgment. *E.g., Neblett v. Carpenter,* 305 U.S. 297, 302 (1938), *reh. den.,* 305 U.S. 675 (1939); *Fox Film Corporation v. Muller,* 296 U.S. 207, 210 (1935); *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590, 636 (1874).

*UNAC's Petition.* UNAC's Petition cites four cases pertaining to the rehabilitation of Pacific Mutual Life In-

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[2] *Accord, McMurray v. Commonwealth,* 249 Mass. 574, 144 N.E. 718 (1924); *Crowell v. Terrell,* 250 S.W. 252 (Tex. Civ. App. 1923); *Cook v. Warner,* 56 Conn. 234, 14 A. 798 (1888); *In re Guardian Mutual Life Insurance Co.,* 13 Hun. 115 (N.Y.S. Ct. 1878), *aff'd.,* 74 N.Y. 617 (1878); *Ruggles v. Chapman,* 59 N.Y. 163 (1874). See also the dicta of the United States Supreme Court quoted above in *Blake v. McClung, supra.*

surance Company of California. (Pet. p. 13.)[3] None of those cases support UNAC's contention that the Indiana rehabilitation proceeding could abrogate statutory rights of North Carolina policyholders in the deposit made in North Carolina for their protection. In *Neblett v. Carpenter, supra,* this Court considered attempts by policyholders of the insolvent insurance company to enforce pre-insolvency contractual rights owed to them under their policies. The other three cases involved similar attempts. Those cases support the proposition that pre-rehabilitation *contractual rights* may be modified pursuant to a rehabilitation proceeding having the necessary jurisdiction. However, aside from the Indiana court's lack of jurisdiction, the cases cited by UNAC are not determinative of the issue now before this Court for two other reasons.

First, the rights of the North Carolina policyholders and, through subrogation, the Guaranty Association are not *contractual rights.* (Pet. p. 15A, 26A.) The claims against UNAC now before this Court are *statutory rights* based upon the laws of North Carolina. While a rehabilitation proceeding can alter a policy contract, the full faith and credit provision of the Constitution would prevent the abrogation of another state's statutes by a rehabilitation proceeding. It is well established that statutes of a state are "public acts" to be accorded full faith and credit under the Constitution. U.S. CONST., art IV, § 1; 28 U.S.C. § 1738; *Carroll v. Lanza,* 349 U.S. 408

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[3] *Carpenter v. Pacific Mut. Life Ins. Co. of Cal.,* 10 Cal.2d 307, 74 P.2d 761 (1937). *aff'd., Neblett v. Carpenter,* 305 U.S. 297 (1938); *Taylor v. Pacific Mut. Life Ins. Co. of Cal.,* 214 N.C. 770, 200 S.E. 882 (1939); *Larson v. Pacific Mut. Life Ins. Co. of Cal.,* 373 Ill. 614, 27 N.E.2d 458, *cert. den.,* 311 U.S. 698 (1940); *Padway v. Pacific Mut. Life Ins. Co. of Cal.,* 42 F.Supp. 569 (E.D.Wis. 1942).

(1955); *Hughes v. Fetter,* 341 U.S. 609 (1951); *Bradford Electric Co. v. Clapper,* 286 U.S. 145 (1932).

Secondly, the statutory rights of North Carolina policyholders and the Guaranty Association do not pertain to the general assets of UNAC. Rather, the claims before this Court pertain to deposits made for the protection of North Carolina policyholders in the event of the very circumstance that occurred. Since the authorities cited by UNAC do not concern deposits, those authorities did not have to take into account the long, consistent line of cases giving priority to persons for whose protection deposits were made. Examples of the many cases and treatises dealing specifically with the application of special deposits, including *Blake v. McClung, supra,* have been cited above. The other cases cited by UNAC (Pet. p. 13) involving shareholders' and agents' contractual claims against the general assets of the rehabilitated company are similarly inapplicable.

UNAC also cites a number of cases to support its contention that deference must be given to domiciliary insolvency proceedings (Pet. p. 13). Again, none of those cases deal with deposits made for security, or with the abrogation of another state's statutes by the domiciliary proceeding. Indeed, in one of the cases cited by UNAC, this Court acknowledged that if there is a local policy expressed in statute or by decision allowing a distribution of assets of a foreign insolvent corporation in favor of local creditors, such a policy would prevail. *Clark v. Willard,* 292 U.S. 112, 121-23 (1934). Such a policy is clearly expressed in North Carolina's enactment of the Uniform Insurers Liquidation Act, which is explicitly applicable to rehabilitation proceedings, and in N.C.Gen.Stat. § 58-185. This local policy draws considerable strength from this Court's acknowledgement of the special status to be afforded deposits in *Blake v. McClung, supra.*

UNAC appears to argue that the North Carolina statutory rights were somehow waived (Pet. p. 14). This waiver argument, however, ignores the fact that the Indiana court lacked the necessary jurisdiction to deal with the deposit and the fact that no one had any reasonable notice that the Indiana rehabilitation proceeding purported to be dealing with the deposit.

The citation by UNAC (Pet. p. 17) of *Relfe v. Rundle*, 103 U.S. 222 (1880) and *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), is rather confusing. It would seem that UNAC is arguing that North Carolina must apply the conflicting law of other states to foreign corporations domesticated in North Carolina. Neither of the cases cited by UNAC stand for that proposition. Indeed, the quotation from *Relfe v. Rundle* in UNAC's petition, consistent with other decisions of this Court, clearly indicates that local law will be applied to the domesticated corporation, rather than the inconsistent law of the corporation's domiciliary state. *Pacific Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 502 (1939). UNAC subjected itself to the statutes dealing with insurance company deposits when it elected to do business in North Carolina. The North Carolina Superior Court found that the Indiana court's actions were "contrary to the applicable law regarding rights in deposits made by foreign insolvent insurance companies as established under Article 17A and Article 20 of the General Statutes of North Carolina." (Pet. p. 26A.)

UNAC also cites *Riehle v. Margolies*, 279 U.S. 218 (1929); *Morris v. Jones*, 329 U.S. 545, *reh. den.*, 330 U.S. 854 (1947); and *Continental Bank and Trust Co. v. Apodaca*, 239 F.2d 295 (10th Cir. 1956); (Pet. p. 19). Both *Riehle* and *Morris* pertain only to the evidentiary effect of a judgment rendered in another jurisdiction. Those cases clearly hold that, in order for a judgment in another

jurisdiction to be recognized, it must be rendered by a court having jurisdiction over the parties and the subject matter. Further, it should be noted that in neither *Reihle* nor *Morris* was the "res" a trust. If neither the trustee nor the trust property is subject to the state jurisdiction, a state court has no jurisdiction over the trust property. *See* W. LAND, TRUSTS IN THE CONFLICT OF LAWS 257 (1940). *Apodaca* involved the question of concurrent jurisdiction of a federal and state court and, thus, is readily distinguishable from the situation in which two state courts both purport to have jurisdiction. Significantly, the Tenth Circuit acknowledged in *Apodaca* that policyholders have special rights in deposits such as the one made by UNAC in North Carolina and stated that " 'to give effect to its jurisdiction, the court must have control of the property,' " 239 F.2d at 298, *quoting Princess Lida v. Thompson,* 305 U.S. 456, 466 (1939).

UNAC states that "after UNAC was released from rehabilitation *there was and is no policyholder in North Carolina who had or has any contract breach claim*" (UNAC's emphasis) and that "UNAC is not currently in default of any contractual obligation to policyholders in North Carolina or any place else." (Pet. p. 19.) These statements, along with the assertion that the deposit is not now subject to the North Carolina insolvency statutes, merely beg the jurisdictional question. The issue is whether the Indiana court lacked jurisdiction to deal with the deposit made by UNAC in North Carolina. Since the Indiana court did lack jurisdiction, it could not prevent the deposit from being used for the purpose for which it was intended – the protection of North Carolina policyholders in the event of an insolvency. UNAC's contention (Pet. p. 19) that it is no longer an "impaired insurer" under the Guaranty Act, is patently inconsistent with the simple wording of that statute. N.C.Gen.Stat. § 58-155.69(6). An "impaired insurer" under the Guaranty

Act is an insurer that " . . . is placed under a *final order* of liquidation, rehabilitation or conservation . . ." (Pet. App. 45A) Rather than removing UNAC from the definition of an"impaired insurer," the final Order of rehabilitation satisfied one of the two alternative conditions for UNAC being so classified.

Finally, UNAC asserts that the opinion of the North Carolina court "renders impossible the rehabilitation of a multi-state insurer." (Pet. p. 21.) This cataclysmic statement is, of course, incorrect. An analogy to rehabilitative bankruptcy proceedings involving secured creditors is appropriate. Despite the fact that secured creditors are given priority as to their security, successful rehabilitative bankruptcy proceedings frequently occur.

This is simply a case in which the Indiana court did not have the jurisdiction necessary to deal with the North Carolina deposit.

## CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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# APPENDIX

## STATE STATUTES INVOLVED

North Carolina Insurance Law

**Uniform Insurers Liquidation Act**
N.C.Gen. Stat. §§ 58-155.10(2), (8) and (10);

**Uniform Insurers Liquidation Act: definitions** – This section and G.S. 58-155.11 to 58-155.17 inclusive, comprise and may be cited as the Uniform Insurers Liquidation Act. For the purposes of this act:

* * *

(2) "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing and conserving such insurer.

* * *

(8) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.

* * *

(10) "Secured claim" means any claim secured by mortage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

N.C.Gen. Stat. § 58-155.15(d):

**Priority of certain claims** –

* * *

(d) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this act [G.S. 58-155.10 to 58-155.17], or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amount shall be conclusive; otherwise the amount shall be determined in the deliquency proceeding in the domiciliary state.

**North Carolina Life and Accident and Health Insurance Guaranty Act.**
N.C.Gen.Stat. § 58-155.66:

**Purpose** – The purpose of this Article is to maintain public confidence in the promises of insurers, to provide a mechanism for the payment of covered claims under certain insurance policies, to assist in the detection and prevention of insurer insolvencies, and to protect policy owners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of the insurer issuing such policies or contracts. To provide this protection, (i) an association of insurers is created to enable the guaranty of payment of benefits and of con-

tinuation of coverages, (ii) members of the Association are subject to assessment to provide funds to carry out the purpose of this Article, and (iii) the Association is authorized to assist the Commissioner, in the prescribed manner, in the detection and prevention of insurer impairments.

N.C.Gen.Stat. § 58-155.72(4) and (9):

**Powers and duties of the Association** – In addition to the powers and duties enumerated in other sections of this Article:

* * *

(4) If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the Association shall, subject to the approval of the Commissioner:
a. Guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured the covered policies of residents;
b. Assure payment of the contractual obligations of the impaired insurer to residents; and
c. Provide such moneys, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties.
If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such foreign or alien impaired insurer.

* * *

(9) a. Any person receiving benefits under this Article shall be deemed to have assigned his rights under the covered policy to the Association to the extent of the benefits received because of this Article whether the benefits are payments

of contractual obligations or continuation of coverage. The Association may require an assignment to it of such rights by any payee, policy or contract owner, beneficiary, insurer or annuitant as a condition precedent to the receipt of any rights or benefits conferred by this Article upon such person. The Association shall be subrogated to these rights against the assets of any impaired insurer.

b. The subrogation rights of the Association under this subdivision shall have the same priority against the assets of the impaired insurer as that possessed by the person entitled to receive benefits under this Article.

N.C.Gen.Stat. § 58-155.73(a):

**Assessments** – (a) For the purpose of providing the funds necessary to carry out the powers and duties of the Association, the board of directors shall assess the member insurers, separately for each account, at such times and for such amounts as the board finds necessary. The board shall collect the assessments after 30 days' written notice to the member insurers before payment is due. In the event that the member insurers do not within the time prescribed pay the assessment set by the board, the Association may file suit against such member insurers jointly and severally for the amounts necessary to carry out the responsibilities of the Association as determined by the board of directors.

**Deposit Statute**
N.C.Gen.Stat. § 58-185:

**Lien of policyholders; action to enforce.** – Upon the securities deposited with the Commissioner of Insurance

by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the Superior Court of the County of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance.